

It's Not Just Politics

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

If you follow Supreme Court decision-making – and, after all, if you listen to this podcast – you’ve probably noticed the tendency of Supreme Court watchers, whether they are highly respected reporters or less thoughtful armchair pundits, to portray decisions as simple battles between “conservatives” and “liberals.” Yet, attributing Supreme Court decision-making to just politics is like watching black-and-white TV, rather than hi-def.

Don’t get me wrong – politics obviously plays an undeniably important role. At all levels of the federal judiciary, judges appointed by Republican presidents demonstrate different degrees of support for “liberal” and “conservative” positions, compared to their Democratic counterparts. (Interestingly, though, the extent of ideological difference varies significantly, depending on the issue and time frame.)

Data on voting patterns of the Justices also suggest ideological influences. For example, in the last full term, Justice Clarence Thomas, perhaps regarded as the most “conservative” justice, voted 81% of the time with fellow conservative Justice Samuel Alito. Thomas only voted 39% of the time with liberal-labelled Justice Ginsburg.

But this data itself suggest that something more is going on: after all, if even the most “conservative” and “liberal” justices agree 39% of the time, other influences must be operating.

It’s in this context that a recent decision about criminal statutory interpretation, *Sessions v. Dimaya*, caught people’s attention.

As a matter of legal doctrine, *Dimaya* wasn’t especially noteworthy. The Court ruled 5-4 that the phrase “felony...involv[ing] a substantial risk [of] physical force” in federal immigration statutes was unconstitutionally vague (that is, as administered, the phrase allowed so much discretion and variance in judicial interpretation as to fail to afford “due process of law”). The majority saw the challenged statutory language as virtually identical to a provision the Court struck down in 2015. Therefore, *Dimaya* was mainly a matter of following precedent – something that often serves as a strong counterweight to ideology and politics.

What made *Dimaya* eye-grabbing was the justice alignment. The Court’s newest appointee, Justice Neil Gorsuch – called as or more “conservative” than Justice Thomas in many accounts – joined the Court’s four “liberals” (Justices Ginsburg, Breyer, Sotomayor and Kagan) in making up the five-justice majority. Significantly, Gorsuch parted company with three other justices generally regarded as fellow “conservatives” and with “swing voter” Justice Anthony Kennedy. That Justice Gorsuch was the only

justice appointed by a Republican president (President Trump) to join the Court's four Democratic-president-appointed justices was enough to raise eyebrows.

But wait, there's more. The plot thickens for two more reasons.

First, the author of the key 2015 decision upholding defendant rights against vagueness in the Armed Career Criminals Act – the decision serving as a precedential guide in *Dimaya* – was none other than “conservative” Justice Antonin Scalia. That makes a second “conservative” acting contrary to simplistic stereotype.

Second, a detailed examination of the *Dimaya* decisions shows that Justice Gorsuch exhibited the broadest (and most “liberal”) view about the importance of protecting individuals against statutory vagueness. In rejecting the Administration's argument that a more government-friendly standard applied to vagueness questions about non-*criminal* statutes, Gorsuch's four “liberal” colleagues were content to rely on the fact that, although not strictly “criminal,” deportation is a “grave” penalty.

Parting company with his majority colleagues, Justice Gorsuch instead wrote broadly about the need for *any* non-criminal law to provide “fair notice.”

Dimaya now joins a long list of even more-high profile cases going against political expectations. My personal favorite is the 2004 decision, *Hamdi v. Rumsfeld*, in which a majority rejected President George W. Bush's indefinite detention of an American citizen suspected of being a terrorist “enemy combatant.” Guess who authored the most anti-Bush/anti-presidential-power opinion in *Hamdi*?

The surprising answer: “Conservative” Justice Scalia, *joined by* “liberal” Justice Stevens!